SUPREME COURT, U. S.

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MICHAEL RODAK, JR.,

IN THE

# Supreme Court of the United States

October Term, 1974

No 74-986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
*Petitioner,*

*v.*

EARLE G. PAYNTER, JR.,
*Respondent,*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 74-986

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THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Petitioner,

v.

EARLE G. PAYNTER, JR.,

Respondent.

Brief In Opposition To Petition For A Writ
Of Certiorari

## PRELIMINARY STATEMENT[1]

This is a negligence case under the Federal Employers' Liability Act (FELA)[2]. It presents

[1]Petitioner, the Chesapeake and Ohio Railway Company, will be referred to throughout as the "C&O". Respondent, Earle G. Paynter, Jr. will be referred to throughout as "Paynter". Reference will be made to the joint appendix filed on appeal unless otherwise designated.

[2]45 U. S. C. 51 et seq

no legal questions not previously resolved, nor is there any dispute over the principles to be applied. The only question is the application of established principles and clearly defined rules to the facts of this case. Paynter respectfully submits that none of the reasons set forth in Rule 19B apply to this case and this Honorable Court should not grant a writ of certiorari.

## II

## QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review a well settled principle that Rule 6a of the Federal Rules of Civil Procedure will extend a federal statute of limitation to a Monday when the statute of limitation expires on a Saturday?

2. Should this Court review the sufficiency of the evidence in a Federal Employers' Liability Act case where the District Court and the Fourth Circuit Court of Appeals properly concluded there was sufficient evidence of the C&O's negligence for the jury to pass on?

## III

## STATEMENT OF THE CASE

Paynter, a railroad employee with the C&O, filed a complaint in the United States District Court for the Western District of Virginia on Monday, March 22, 1971 against the C&O alleging injuries sustained on March 19, 1968 as a result of the C&O's negligence. Paynter's complaint was amended several times

one of which stated that Paynter did not have knowledge of his injury until March 20, 1968. The C&O filed an answer and a motion to dismiss alleging that Paynter's cause of action was barred by the FELA three year statute of limitation. The District Court then held a hearing on the motion to dismiss, and the C&O offered no evidence at this hearing. Paynter offered extensive evidence by way of depositions and Paynter's evidence was uncontradicted. The District Court held that Paynter's suit was timely commenced as a matter of law. (See entire written opinion of District Court Appendix 1a - 6a which the C&O failed to include in its petition for certiorari) The District Court concluded from the uncontradicted facts and evidence that the FELA three year statute of limitation did not run until March 20, 1971, a Saturday, and that since March 20th was a Saturday and the Clerk's Office was closed, that Paynter had until Monday, March 22, 1971, the next day which is neither a Saturday or Sunday to commence his action and that Paynter did commence his action by March 22, 1971. (See Appendix to this Brief, pages 1a-6a) The District Court made a specific factual finding that Paynter did not have knowledge of his injury until March 20th, 1968. The case was then set for a trial by jury.

The evidence showed that on March 19, 1968, Paynter was a yard conductor in charge of a crew making up a train called 95 West in the Smith Creek Yard in Clifton Forge, Virginia (120). Pullen was a brakeman (140), McCoy, a brakeman (140), and Fisher was the engineer (140). The crew was working the

7:00 A.M. to 3:00 P.M. shift.

The crew had been kicking cars into the number two track in order to make up the train known as 95 West (119, 120). The switch known as number one and two was lined up for the number two track (157). There was no need for Paynter's crew to throw the number one and two switch to the number one track (81, 95). However, there were several other crews working in the yard (88). All testimony indicated that switch number one and two had to be lined up with track number two in order to protect any train doubled over on track number one (94, 95, 131). When Paynter last noticed switch number one and two before a break, it was lined up with the track number two (157, 162). After a break, Pullen, the head brakeman, cut a car off from the engine into the number two track (144). Paynter was standing about 50 feet away from switch number one and two and saw that switch number one and two was set wrong as it was aligned with track number one (158). Paynter immediately went over to the switch to change it from number one to number two in order to prevent the car cut by Pullen from running into the train on track number one. Paynter had to jerk the switch to get it up (159) and felt a "thing" hit him in the back when he pushed the switch down to line it with the number two track (159). Evidence showed that Paynter did not know he was injured at this time. (See Appendix to this Brief, pages 1a-6a; see also 159, 163, 164, 177, 178, 182).

Paynter maintained that one of the members

of the road crew that brought in a long coal train pulled the wrong switch (157, 188). All members of Paynter's crew denied throwing the switch to the number one track.

Paynter stated that the switch didn't work in the usual manner (159), that there was sand and dirt in it (159) and that he had to jerk it to operate it (160). Other railroad employees agreed that if switch number one and two was not clean it would not operate right (122, 142). An accident report filed by Paynter the next day on March 20, 1968 when he realized he was injured indicated that the switch was defective (179). R. A. Wilson, a railroad employee, also indicated that switch number one and two was not working properly on March 19th, 1968 (150). Switch number one and two was in an improper working order at all times since the switch had to be jerked in order to reverse the movements of the switch points (137).

R. E. Johnson, a brakeman, who frequently worked at the Smith Creek Yard indicated that switch number one and two was unusual and the only switch of its kind in the Clifton Forge Yard (72). This switch had a bar parallel and just off the ground about two and one-half feet long with a metal ball on the end that weighed 12-15 pounds (72). All other switches at Clifton Forge had a lever that stood at a 45 degree angle with a latch that kept the switch points from moving (126, 127). Switch number one and two did not have a latch and the switch points were kept from moving by the weight of the metal ball (90). Johnson was of the opinion that switch number one and

two was harder to operate than the other switches in the yard with a latch (77, 84). Other witnesses agreed that switch number one and two was adjusted tighter than the latch switches in order to keep the switch points from moving and consequently was more difficult to throw (91, 95, 126, 149). In addition, the latch or raccor switches when contrasted with switch number one and two could be operated without bending all the way over (76, 90, 126).

Evidence also showed that the switches were only greased occasionally and then with a heavy oil which made things worse when sand got in it rather than being lubricated with graphite (86, 92, 93). Sand would get in the switches and the switches were not cleaned daily (87). It took about twenty-twenty-five minutes to clean a switch and the C&O had only three men available to clean over 250 switches in the yard.

The condition of switch number one and two was not new to the C&O. Johnson had complained about the condition of the switch to the yardmaster and trainmaster (79). Bocock had made complaints to the trainmaster about the mechanical condition of switch number one and two prior to March 19th, 1968 (93). Showalter, a union representative, had made complaints about the switch (128, 129). Ray Wilson had complained to his supervisors prior to March 19, 1968 that switch number one and two would hang (150). Paynter had reported to the yardmaster many times that the switch needed cleaning (161).

The jury found for Paynter and awarded him $125,540.00 in damages for his disabling injuries which injuries precluded Paynter from any future employment with the C&O. The court reduced the verdict of $125,540.00 to $100,432.00 which reduction was due to the jury finding Paynter contributorily negligent in the amount of twenty percent. The District Court overruled the C&O's motion for judgment notwithstanding the verdict and its motion for a new trial (Appendix B, see pages 20 and 21, petition for a writ of certiorari). The Fourth Circuit Court of Appeals in a per curiam opinion found no reversible error and found sufficient evidence to take the case to the jury (See Appendix B, page 19 of petition for a writ of certiorari). The C&O then sought to have a rehearing in banc which rehearing was denied on December 6, 1974 (See Appendix B, page 18 petition for a writ of certiorari). The C&O's petition for certiorari was filed in this Court on February 7, 1975.

## IV

## ARGUMENT

Paynter's suit was timely commenced.

The District Court found that the three year statute of limitation did not run until Saturday, March 20, 1971, which finding is not challenged by the C&O. The uncontradicted evidence at the hearing on the motion to dismiss showed that Paynter did not know he was injured until March 20th, 1968 and that Paynter's cause of action did not accrue until Paynter discovered his injury. (See Appendix to this

brief 1A-6A); see also Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 73 L. Ed. 1282 (1949).

The C&O argues that this Court should grant certiorari because Rule 6a of the Federal Rules of Civil Procedure cannot extend the FELA three year statute of limitation to a Monday when the last day of the statute runs out on a Saturday or Sunday. Paynter respectfully submits that this issue has been decided by all levels of state and federal courts including this Court and is not an issue that would warrant this Court granting certiorari under Rule 19B of the Rules of the Supreme Court of the United States.

In Union National Bank v. Lamb, 337 U.S. 38, 69 S. Ct. 911, 93 L. Ed. 1190 (1949), the Supreme Court of the United States held that Rule 6a of the Federal Rules of Civil Procedure would extend beyond 90 days, the time for filing a petition for writ of certiorari when the last day fell on a Sunday. This Court held that the petition for certiorari was timely commenced by filing the petition on the 91st day because the language of Rule 6a provided that where the last day for performance of an act falls on a Sunday or a legal holiday, performance on the next day which is not a Sunday or legal holiday is timely commenced. (Note Rule 6a now covers Saturdays). The Court then discussed the purpose of Rule 6a and stated

> "that rule provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by "any applicable statute" (Italics ours). Since the rule

had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the consideration of liberality and leniency which find expression in Rule 6 (a) are equally applicable to 28 U. S. C. A. 2101 (c)". See Lamb, supra, 40, 41.

It is to be noted that Rule 6a was initially adopted by Congress in 1934 and was in affect when the FELA three year statute of limitation found in 45 U. S. C. Section 56 was adopted in 1939. Congress has expressed no contrary policy in 45 U. S. C. Section 56 which would preclude the application of Rule 6a of the Federal Rules of Civil Procedure. See 45 U. S. C. Section 56; See Lamb, supra; See Jones and Laughlin Steel Company v. Grideron Steel Company, 382 U. S. 32, 86 S. Ct. 152, 15 L. Ed. 2d 26 (1965) where this court held in a per curiam decision that a notice of appeal was timely filed on 32nd day when 30th day fell on a Saturday. See also Street v. United States, 133 U. S. 299, 10 S. Ct. 309, 33 L. Ed. 631 (1890). In Rutledge v. Sinclair Refining Co., 13 F. R. D. 477 (1953), a District Court held that Rule 6a is applicable to 45 U. S. C. Section 56 and held that a suit commenced on Monday was timely commenced when the statute of limitation expired on a Sunday. (Rule 6a did not cover Saturdays at that time). Of course, any other interpretation would reduce the limitation period to a period of less than three years which limitation would be contrary to 45 U. S. C. 56 and to the decisions of this court interpreting the humanitarian purposes of the Federal Employers' Liability

Act. See Burnett v. New York Central Railroad, 380 U. S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965). See Glus v. Brooklyn Eastern Terminal, 359 U. S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959); See Herb v. Pitcarin, 325 U. S. 77, 65 S. Ct. 954, 89 L. Ed. 1493 (1945).

There is no conflict among the Circuit Courts on this issue. In Wilkes v. United States, 192 F 2d 128 (5th Cir. 1951), a federal statute required a suit to be instituted within two years for a tax refund. The two year period expired on a holiday and suit was filed on Monday. The Fifth Circuit in Wilkes, supra, held that Rule 6a applied to any applicable statute and extended the two year statute of limitation to Monday. The Fourth Circuit in Wirtz v. Peninsula Shipbuilders Association, 382 F. 2d 237 (4th Cir. 1967) held that a suit was timely commenced under the Labor Management Reporting and Disclosure Act where a suit had been filed on a Monday, one day after the 60 day statute of limitation period had run on a Sunday. The Seventh Circuit reached the same result in Brennan v. Independent Lift Truck Builders Union, 490 F 2d 213 (7th Cir. 1973). The Tenth Circuit held in Johnson v. Flemming, 264 F 2d 322 (10th Cir. 1959) that Rule 6a would extend the 60 day statute of limitation period which a social security applicant has to commence a suit in Federal Court. (See also United States v. Petees, 220 F 2d 554 (10th Cir. 1955) where Rule 6a will control any statute of limitation unless the statute of limitation provides otherwise). The First Circuit in Smith v. Pasqualetto, 246 F 2d 705 (First Circuit 1957) held that a negligence case was

timely commenced when the statute of limitation ran on a Sunday or legal holiday and the suit was commenced on a Monday. The Court of Appeals for the District of Columbia in Sherwood Bros. v. District of Columbia, 113 F 2d 162 (1940) held that under common law and Rule 6a a suit was timely brought on a Monday when the statute of limitation ran on a Sunday. See also Simon v. Commissioner of Internal Revenue, 176 F 2d 230 (2nd Cir. 1949); See United States v. Cia Luz Stearica, 181 F 2d 695 (Ninth Cir. 1950).

District Courts have ruled the same way. See Powell v. Kuel, 329 F. Supp. 193 (M. D. Penn 1971) where a District Court held that a suit commenced on a Monday was timely commenced under the one year statute of limitation act provided by the Food, Drug and Cosmetic Act where the statute of limitation ran on a Sunday. See Pennsylvania Public Utilities Commission v. United States of America, 311 F. Supp. 1024 (M. D. Penn 1970) where the District Court interpreted any applicable statute of Rule 6a to mean the time period in any statute that will be applied in an action in a District Court. See Miller v. Daybrook - Octtavia Corporation, 291 F. Supp. 896 (M. D. Ohio 1968) where the court held that Rule 6a is applicable to statute of limitation.

State Courts which have a similar statute or rule to Rule 6a of the Federal Rules of Civil Procedure have concluded that if the statute of limitation expires on a Saturday, Sunday or a holiday, a suit will be timely commenced if instituted on the next business day. See Brown v. Porter, 163 N. W. 2d 709

(Michigan 1968); See Romaine v. State Farm Mutual Automobile Insurance Company, 485 P 2d 102 (Nevada 1971); See Bowling v. Webb Gas Company, Inc. of Lebanon, 505 S. W. 2d 39 (Missouri 1974); Hardbarger v. Deal, 127 S. E. 2d 771 (N. C. 1961); Wooten v. State Compensation Comm., 95 S. E. 2d 643 (W. Va. 1957); Bremby v. Armdir and Company, 95 N. W. 2d 449 (Iowa 1950); Associated Transport v. Pusey, 118 A 2d 362 (Delaware 1955); Poetz v. Mix, 81 A 2d 741 (N. J. 1951).

The case of Joint Council v. Delaware L. & W. R. Co., 157 F 2d 417 (2nd Cir. 1946) cited by the C&O is not authority for saying that Rule 6a of the Federal Rules has no application to a statute of limitation because the Second Circuit concluded that the suit was timely commenced and did not hold that Rule 6a did not apply to a statute of limitation. The cases cited in the footnote of Lamb, supra, which the C&O uses to support its position were all decided before the adoption of Rule 6a and have been overruled or repudiated. Therefore, it is well settled through decisions of State Courts, District Courts, Circuit Courts and this Court that Rule 6a of the Federal Rules of Civil Procedure would extend a statute of limitation to a Monday if the last day expires on a Saturday or Sunday.

II. There was sufficient evidence for the jury to pass on.

The C& O has not accurately reported the facts and has failed to state the evidence and inferences therefrom in the light most favorable to Paynter, the verdict winner. Switch number

one and two was the only one of its kind in the Clifton Forge Yard where there were over 250 switches (72, 92). Switch number one and two was a ball type switch while all other switches in the yard were a raccor switch which could be handled in an upright position (126). Paynter testified that he had to jerk switch number one and two several times to get it up (159, 160), that the switch did not work in the usual manner (159), that the switch worked hard (159), and that there was sand in the switch (159, 160).

> Q. Now, you say you had to jerk it. Did the switch operate in the usual manner or did it not operate -
>
> A. No sir, it did not. It was sand in it and it worked hard, and I had to jerk it to get it up, and you had to get your feet on it to shut it down (159).
>
> Q. Now, did the switch come up or not when you pulled up on it?
>
> A. It come up but I had to jerk it up. It had sand and dirt in it (160).
>
> Q. Did it come all the way up or not?
>
> A. It come about half way up (160) --

A number of railroad employees confirmed the fact that switch number one and two would not work properly when there was sand in it (122, 142). Other testimony showed that the switch was in improper working order at all times because the switch had to be jerked to

reverse the switch points (137). R. A. Wilson, an employee of the C&O, stated that switch number one and two had a hang in it which prevented it from working properly (150). Evidence also indicated that switch number one and two was adjusted tighter than other switches and was difficult to throw (91, 126, 149). Other switches in the Clifton Forge Yard were kept from moving by a latch rather than a tight adjustment (126).

Evidence also showed that switch number one and two was not maintained properly. Switch number one and two was lubricated with a heavy oil instead of graphite (86, 92, 93). Testimony also showed that the switch had to be cleaned every day because sand got in it, that the C&O did not have sufficient men to keep the switches cleaned (92, 127, 128, 129) and there was sand in the switch at the time of Paynter's injury (159, 160).

In reviewing the sufficiency of the evidence of a Federal Employers' Liability case, the United States Supreme Court, in the landmark case of Rogers v. Missouri-Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1956) held

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on

> grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury case is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights to make that appraisal and, if that test is met, are bound to find that a case for the jury is made whether or not the evidence allowed the jury a choice of other probabilities. The Statute expressly imposes liability on the employer to pay damages for injury or death "in whole or in part" due to its negligence." See Rogers, supra, at 506, 507. (Emphasis added)

A reading of the evidence and reasonable inferences therefrom shows there was sufficient evidence of the C&O's negligence to submit to the jury. See Webb v. Illinois Central Railroad Company, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957); See Davis v. Virginia Railway, 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960). Reasonable or fair minded men could have concluded from the evidence that the C&O failed to provide Paynter with a reasonably safe place to work. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943); See Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1445 (1943);

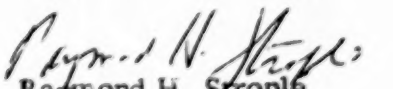
See Washington and G. R. Co. v. McDade, 135 U. S. 554, 10 S. Ct. 1044, 34 L. Ed. 235 (1890); See Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

The C&O also argues that it was denied due process because of a number of prejudicial errors. Each of these errors were briefed and argued before the Fourth Circuit. In passing, it is to be noted that the C&O made no objection to the statements of Paynter's counsel in closing argument. The C&O made no objection to the charge of the court other than the charge was heavily weighted in favor of Paynter. Of course, this objection does not meet the requirements of Rule 51 of the Federal Rules of Civil Procedure. Paynter, in making a case to the jury, had to prove that the C&O knew or should have known of the condition of switch number one and two (56-59). The Court charged the jury that the only issue before it was whether Paynter had a reasonably safe place to work at the time of his injury and that Paynter had to prove that switch number one and two was in a defective condition at the time he was injured and not some other time either prior to or subsequent to his injury. (See Charge 49-65). Evidence of previous complaints about the switch and the length of time the switch was in an unsafe condition was relevant to the C&O's knowledge. See Inman v. Baltimore and O. Ry. Co., 361 U. S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959); McCracken v. Richmond, Fredericksburg and Potomac R. Co., 240 F 2d 484 (4th Cir. 1957).

## CONCLUSION

The case was fully and fairly tried. There is no issue of national importance which would warrant this Court granting a writ of certiorari. The decision of the Fourth Circuit is consistent with the decisions of this Court and of other Federal Courts. This Court has long recognized that in a FELA case the jury is the tribunal to decide issues of fact where fair minded men could reach different conclusions. This Court should deny the C&O's petition for a writ of certiorari.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief were mailed to Aubrey R. Bowles, Jr. and Aubrey R. Bowles, III, 900 Mutual Building, Richmond, Virginia 23219, counsel for Petitioner, on the 3rd day of March, 1975.

Raymond H. Strople

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

EARLE G. PAYNTER, JR.,

Plaintiff,

vs. CIVIL ACTION 71-C-6-C

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Defendant.

Ruling On Motion To Dismiss

Plaintiff was injured on March 19, 1968. Plaintiff filed his suit on March 22, 1971. The time limit allowed under FELA is three years as required by 45 U.S.C.A. § 56. Rule 6 of the Federal Rules of Civil Procedure provides as follows:

> (52) In computing any period of time prescribed or allowed by these rules, by local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be counted. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day, which is not a Saturday, a Sunday, or a legal holiday. (Emphasis added)

Under Rule 6, the designated period of time did not begin to run until the date following the accident, March 20, 1968. Three years from that date, March 20, 1971 fell on a Saturday, and the following day was Sunday. Therefore, the court finds that plaintiff's suit, filed on Monday, March 22, 1971, falls within the statutory three-year period.

It has been held that Rule 6 of the Federal Rules of Civil Procedure is applicable to pleadings and statutes of limitations and that in computing time the first day should be excluded and the last day included. Miller v.

Daybrook-Ottawa Corp., 291 F. Supp. 896 (1968).

In Rutledge v. Sinclair Refining Co., 13 F.R.D. 477 (S.D. N.Y. 1953), the court said at 478 that "the basic issue is whether Rule 6 (a) is applicable to a Federal statute of limitation when the last day of the period prescribed by it falls on a Sunday. (Rule 6 at that time did not include Saturdays). The court specifically held that the statute of limitations under FELA was controlled by the provisions of Rule 6 of the Federal Rules of Civil Procedure.

The court also notes that plaintiff testified that although he was injured on March 19, 1968, he had no knowledge of his injury until March 20. Under FELA, a cause of action only accrues when the plaintiff has reason to know he is injured. The Supreme Court in Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) stated that statutes of limitations only require the assertion of claims within a specified period after notice of invasion of legal rights. This has been interpreted by the Fourth Circuit Court of Appeals as follows:

> The Urie case unquestionably demonstrates the Court's view that when the nature of the injury is such that it does not manifest itself immediately, the determination of when the cause of action accrued does not depend on when the injury was inflicted. To the contrary, (53) the cause of action accrues only when the plaintiff has reason to know he has

been injured. (Emphasis added) Young v. Clinchfield Railroad Co., 288 F. 2d 499, 503 (4th Cir. 1961)

The court notes that until the plaintiff knew that he was injured, he was legally ignorant of the existence of his alleged cause of action. Therefore, it may be said that the cause of action accrued on March 20, 1968, when the plaintiff first discovered his injury.

The defendant seeks dismissal because the claim arose more than three years prior to the filing of the amended complaint. The amended complaint was filed on July 24, 1972 and the injury was discovered on March 20, 1968. The Supreme Court has held that where an amendment merely expands or amplifies the cause of action already asserted, it relates back to the commencement of the action and is not affected by the intervening lapse of time. Seaboard Airline v. Renn., 241 U.S. 290, 36 S. Ct. 567, 60 L. Ed. 1006 (1916). This court notes that the amended complaint filed on July 24, 1972 merely expanded and amplified the original complaint of March 22, 1971 and therefore relates back to the commencement of the action.

The court notes that the FELA statute of limitations is not totally inflexible, but may be extended beyond three years. Burnett v. New York Central R.R., 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); Mumpower v. Southern Railway Company, 270 F. Supp. 318 (W.D. Va. 1967). One of the well recognized exceptions which will toll the FELA statute of limitations is the

doctrine of estoppel. Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959). The general law is stated in 24 A L. R. 2d 1413, 1435:

> Actual fraud in the technical sense, bad faith, or an intent to mislead or deceive is not essential to create an estoppel against setting up the statute of limitations, it being sufficient for this purpose that the (defendant) made misrepresentations which misled the (plaintiff), who acted upon them in good faith, to the extent that he failed to commence action within the statutory period.

The facts appear in this case to indicate that the plaintiff was given assurances by three C&O doctors, Dr. Woodhouse, Dr. Edmonds and Dr. Vermilya that his injury was minor and that he could return to work. In (54) addition, a claims agent advised the plaintiff in June 1968 that he had three years within which to file his action.

The court feels that there remain factual questions as to the representations made to the plaintiff and to the issue of negligence, all of which may be submitted to the jury at the time of trial.

Accordingly, for the above-stated reasons, it is hereby ordered and adjudged that defendant's motion to dismiss on the ground of statute of limitations is overruled and denied.

The court is of the opinion that this decision and order entered herein involve a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the decision and order may materially advance the ultimate determination of this litigation, pursuant to the provisions of Title 28, U. S. C. sec. 1292 (b). An appeal is granted.

The clerk is directed to send a certified copy of this opinion to counsel of record.

Enter:

/s/ Ted Dalton
U. S. Chief District Judge
June 12, 1973